COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION
Oversight Hearing on "The Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act"
OCTOBER 20, 2005

STATEMENT OF J. GERALD HEBERT
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Good morning Chairman Chabot, Rep. Nadler, and distinguished committee members. Thank you for the opportunity to testify before you today. I will focus my comments on the bailout provisions of the Voting Rights Act (VRA), but would like to state at the beginning that the Act should be extended and the bailout provisions be retained largely in their present form.

The marches, protests, and struggles of the civil rights community culminated in 1965 with the passage of the VRA. Individual adjudication of disputes had been ineffective in securing minority citizens an equal opportunity to cast their ballots. Congress took a fresh approach, establishing a formula subjecting certain jurisdictions to administrative or judicial preclearance of changes affecting voting, and setting up a means for those jurisdictions to bailout out of coverage at a later date.

A jurisdiction is covered, and required to preclear all changes effecting voting, if it (1) maintained a test or device as a prerequisite to voting as of one of three fixed dates, and (2) as of that date either less than 50 percent of its voting age residents were not registered to vote or less than 50 percent of its voting age residents actually voted.

Between 1965 and 1982, these covered jurisdictions could bailout of coverage by demonstrating in an action for declaratory judgment before a three-judge panel of the United States District Court of the District of Columbia that no test or device had been used in a given number of years. Political subdivisions, such as counties, were prohibited from bailing out separately if they were located within a state that was covered in its entirety.[1]

In 1982, Congress enacted two major revisions to the bailout provisions. First, political subdivisions could bailout separately from their covered jurisdictions. Second, the bailout criteria were changed to "recogniz[e] and reward[] their good conduct, rather than require[e] them to await an expiration date which is fixed regardless of the actual record."[2]

Under the current bailout formula, a covered jurisdiction must first demonstrate that <u>in the past 10 years</u>: (1) no test or device has been used to determine voter eligibility with the purpose or effect of discrimination, (2) no final judgments, consent decrees, or settlements have been entered against the jurisdiction for racially discriminatory voting practices, (3) no federal examiners have been assigned to monitor elections, (4) there has

[1] *City of Rome v. United States*, 446 U.S. 156, 167 (1980).
[2] 1982 S. Rep. No. 417, 97th Cong., 2d Sess. 46, *as reprinted in* 1982 U.S.C.C.A.N. at 222.

been timely submission of all voting changes and full compliance with §5, and (5) there have been no objections by the Department of Justice or the District Court for the District of Columbia to any voting changes.[3] Second, the jurisdiction bears the burden of proving at the time bailout is sought that any dilutive voting procedures have been eliminated, constructive efforts have been made to eliminate any known harassment or intimidation of voters, and it has engaged in other constructive efforts at increasing minority voter participation such as, expanding opportunities for convenient registration and voting and appointing minority election officials throughout all stages of the registration/election process.[4]

The current bailout formula was an important step towards achieving the goals of the VRA. It gave covered jurisdictions an incentive to move beyond the status quo, and to improve accessibility to the electoral process for minorities. As the Senate Judiciary Committee report stated, "the goal of the bailout … is to give covered jurisdictions an incentive to eliminate practices denying or abridging opportunities for minorities to participate in the political process."[5]

Congress should examine whether there is evidence that the bailout provision actually "provide[d] additional incentives to the covered jurisdictions to comply with laws protecting the voting rights of minorities, and … improve[d] existing election practices."[6] I believe it has.

The Supreme Court has indicated a strong Congressional record demonstrating the existence of discrimination is required when legislating in this area.[7] In 1970, 1975 and 1982, Congress commissioned studies to collect evidence on voter discrimination. In 1970, the Act was extended because while there was a significant increase in black voter registration, there was continued racial discrimination in the electoral process (e.g., switching from single-member districts to at-large elections, redrawing boundaries, minority candidates prevented from running, illiterate voters being denied assistance, racial discrimination in selection of poll officials, harassment, intimidation) and black voter registration rate lagged behind white rate.[8] Similarly, in 1975 minority registration rates improved, but still lagged behind whites and restrictions on registration, casting a ballot, running for office, intimidation and vote dilution still existed.[9] In 1982, the Commission on Civil Rights report documented continued resistance by individuals and local jurisdictions to increased minority participation in elections and to complying with the VRA. What evidence about all this exists today? Congress has a duty, whether it extends the Act or not, to answer this question.

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[3] 42 U.S.C. §1973b(1)(A-E) (2005).
[4] 42 U.S.C. §1973b(1)(F) (2005).
[5] 1982 S. Rep. No. 417, 97th Cong., 2d Sess. 46, 60, *as reprinted in* 1982 U.S.C.C.A.N. at 238.
[6] *Id.*, at 222
[7] *City of Boerne*, 521 U.S. 507, 525 (1997).
[8] Paul F. Hancock and Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 Urb. Law. 379, 393-394 (1985).
[9] *Id*. 397, fn. 93-98.

I have served as legal counsel to all of the jurisdictions that have bailed out since the 1982 amendments to the VRA. All of them are in Virginia and are listed in Appendix A.

Local jurisdictions with which I have worked have expressed to me several advantages that they derive from the current bailout formula. For instance, by requiring them to prove a ten-year record of good behavior and to demonstrate improvements to the elections process for minorities, these covered jurisdictions are afforded a public opportunity to prove it has fair, non-discriminatory practices. Second, while bailouts come with some costs (on average about $5,000 for legal expenses), it is still less costly than making § 5 preclearance submissions indefinitely. Finally, once bailout is achieved local jurisdictions are afforded much more flexibility and efficiency in making routine changes, such as moving a polling place.

For all of its advantages, however, only a few jurisdictions have bailed out. Some argue § 5 should be retained *because* jurisdictions have not been achieving bailout on a mass scale, and that this is evidence there are still many problems with the election processes in these jurisdictions.[10] This assumes that jurisdictions are applying and being denied, when really the problem is that jurisdictions are just not applying. (See Appendix A). Why is this?

One reason might be that smaller localities just do not know the bailout option is available to them, or it seems too complicated or time consuming. For the vast majority of jurisdictions, the process is relatively straightforward and easy. I would recommend that when the legislation is reauthorized, Congress suggest the Department of Justice provide more information to localities about how to achieve bailout and encourage them to do so.

Another reason posited for the lack of bailouts is that the criteria are thought to be too difficult to meet. That is not the case. Most of the factors to be demonstrated are easily proven for jurisdictions that do not discriminate in their voting practices.

One factor, proving §5 compliance, is often cited as the most difficult to meet because opponents to bailout are likely to be able to find some small change that was not precleared. But this is not an obstacle either.

There are several reasons why demonstrating § 5 compliance should be retained as part of the bailout formula. First, DOJ will allow a jurisdiction that inadvertently failed to submit a few changes to submit those changes for preclearance at the time bailout is sought, and thus the preclearance is nunc pro tunc. Second, the legislative history shows that Congress thought that for changes which "are really *de minimis*" the "courts and Department of Justice have used and will continue to use common sense."[11] While this process of going back and making these § 5 submissions can be time-

[10] Vernon Francis et al., *Preserving a Fundamental Right: Reauthorization of the Voting Rights Act,* Lawyers' Committee for Civil Rights Under Law, at 11, June 2003.
[11] 1982 S. Rep. No. 417, 97th Cong., 2d Sess. 46, 48, *as reprinted in* 1982 U.S.C.C.A.N. at 226.

consuming, it ensures full compliance with the Act and is faithful to the language and spirit of the law.

While most jurisdictions who have sought bailout since 1982 have had to make few such submissions, (See Appendix A) some county officials know that political subdivisions, such as towns and cities within the county, have not made any submissions. This affects the County's ability to obtain an expedited bailout. In King's County, California, for example, 40-50 submissions have been required on behalf of localities, some of which do not even exist anymore. Furthermore, King's County does not have authority to compel the localities' compliance with § 5.

Several amendments were proposed in 1982 which would have made it easier for states to bailout without each of its political subdivisions bailing out, and each was rejected.[12]

A better solution may be to allow towns, cities and other local governmental units within a covered county to bailout independently. Then, once each has bailed out, the county can bailout without having to make submissions on behalf of each town or city within its borders. In this sense, the town-county relationship mirrors the current county-state relationship that exists under the current bailout law. The county would still need to make submissions for any changes it makes until it seeks bailout.

To consider the merits of this, Congress should examine § 5 in covered states to see if allowing a bailout to jurisdictions within the state has proven to be problematic from an enforcement or compliance perspective. If a county can bailout now in a state like Virginia that is completely covered (and they can and have done so), has exempting parts of a state from preclearance obligations or other special remedial provisions caused any problems from an enforcement perspective? That would shed light on whether Congress might want to allow a local government to bailout within a covered county, or vice versa.

A third criticism of the bailout provision relates to the VRA coverage formula. ("Places bound by the preclearance provision are identified by a formula based on minority participation in election *more than three decades ago.*"[13]) The bailout provisions, on the other hand, were designed to "relate to the jurisdiction's recent record of behavior rather than to a mere calendar date."[14] To the extent that only jurisdictions that meet the coverage formula need to seek bailout, the bailout provisions suffer from whatever overbreadth or other potential problems exist with regard to the coverage formula.

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[12] H.Amdt. 266 to H.R. 3112, 97th Cong., 1st Sess., *offered* Oct. 5, 1981would have allowed a state to bailout if two-thirds of its political subdivisions bailed out, and H.Amdt. 272 to H.R. 3112, *offered* Oct. 5, 1981 and S.UP.Amdt. 1029 to S. 1992, *offered* Jun. 18, 1982, both would have allowed a state to bailout if the state met all the criteria, even if its political subdivisions did not. Each was rejected, because the 15th amendment places the burden of protecting the electoral franchise on the States.

[13] George F. Will, *VRA, All of It, Forever?*, Newsweek, Oct. 10, 2005.

[14] 1982 S. Rep. No. 417, 97th Cong., 2d Sess. 46, *as reprinted in* 1982 U.S.C.C.A.N. at 222.

Some argue the current coverage formula may be unconstitutional because of a lack of "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[15] §2 of the 15th Amendment to the United States Constitution grants Congress the authority to enforce § 1, namely "the right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude." After passage of the Voting Rights Act in 1965, the Supreme Court held in *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966), that Congress had the remedial authority under the 15th Amendment, §2 to pass parts of §4 of the VRA. Again, in 1980 the Supreme Court stated in *City of Rome v. United States*, 446 U.S. 156, 177, that preclearance "is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting."

Congress' authority to enact remedial legislation under the Fourteenth Amendment was later reviewed in *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997), and the Court determined that Congress' remedial authority extends only to enforce prevention of unconstitutional actions, not to make substantive change in the governing law. *Id.* at 520 (holding Congress did not have the remedial authority to pass the Religious Freedom Restoration Act). Some thought this holding signaled potential problems for the VRA's constitutionality, yet just two years later the Court stated in *Lopez v. Monterey County*, 525 U.S. 266, 282-283 (1999), "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved for the states."

Thus, the remedial provisions of the VRA, including the bailout provision, must be proportional to the injury to be prevented. Considering the bailout provision applies to jurisdictions based on a coverage formula that most seem to agree is outdated, one solution would be to revise the coverage formula. It's perhaps the hardest issue facing the Congress. This is an area the Congress should give serious consideration and study to.

A solution might be crafted along the following lines: a jurisdiction is covered if (1) there is a disparity between the percentage of registered minority voters or percentage of minority voters who cast ballots in the last presidential election on the one hand, and the actual voting age population percentage of minorities on the other; or (2) the jurisdiction provided English only election materials and assistance and more than five percent of the voting age residents are members of a single language minority.

This formula would seemingly target the remedy toward the potentially discriminatory conduct in a more direct way than a formula based on the results of a presidential election conducted thirty years ago. Jurisdictions which meet this formulation would be presumptively covered and subject to § 5 preclearance. They may seek bailout from coverage immediately, but would be required to meet the same bailout factors that currently exist.

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[15] *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

When devising a new formula, it is important to keep in mind the original purpose of the coverage formula: "The coverage formula of section 4(b) was designed to limit the Act's most stringent remedies to those areas of the country where congressional investigation had disclosed the most prevalent and pervasive degree of racial discrimination in voting."[16] Congress has done a magnificent job each time it extended the Act in the past to gather detailed information on how the Act was working. It should once again undertake that effort.

To this extent, and to the extent that §5 preclearance had worked as evidenced by the steady submissions of changes, the sharp reductions in objections (See Appendix B), and the practical standards for bailout that currently exist, we are headed toward a day when there will be no discrimination that affects the ability of any person to register to vote or to cast a ballot, and our democracy will be better for it.

Thank you.

[16] *City of Rome*, brief by Appellees pg 44 (citing H.R. Rep. No. 439, 89th Cong., 1st Sess. 8, 12-14 (1965); S. Rep. No. 162 (Pt. 3), 89th Cong., 1st Sess. 13-16 (1965); *Sheffield*, 435 U.S. at 119-120

Bailouts Filed Since 1982 Amendments to VRA

Name of Jurisdiction	Bailout Filed Date	Bailout Granted Date	% Black	% Hispanic	# of Unprecleared Changes (if any)	# of Years Post-Bailout Reporting Required
Fairfax City, Virginia	September 25, 1997	October 21, 1997	4.5%	5.2%	0	0
Frederick County, Virginia	April 19, 1999	September 9, 1999	1.7%	0.5%	0	0
Shenandoah County, Virginia	April 21, 1999	October 15, 1999	1.1%	0.7%	31	5
Roanoke County, Virginia	August 11, 2000	January 24, 2001	2.5%	0.5%	6+	4
Winchester City, Virginia	December 22, 2000	May 31, 2001	9.1%	5.9%	0	4
Harrisonburg City, Virginia	February 14, 2002	April 17, 2002	5.5%	7.2%	0	3 (If requested by the DOJ)
Rockingham County, Virginia	March 28, 2002	May 21, 2002	1.3%	2.7%	1	1
Warren County, Virginia	August 30, 2002	November 25, 2002	4.7%	1.5%	7	3
Greene County, Virginia	September 8, 2003	January 19, 2004	6.1%	1.1%	1	2

Bailouts Currently Pending

Name of Jurisdiction	Bailout Filed Date	Bailout Granted Date	% Black	% Hispanic	# of Unprecleared Changes (if any)	# of Years Post-Bailout Reporting Required
Augusta County, Virginia	September 23, 2005	(Pending)	3.9%	0.8%	3	0
Kings, County, California	(Pending)	N/A	8.3%	43.6%	40-50 (est.)	N/A

Texas

Justice Department Objections -- 1985 -- 1994

Rusk Independent School District (Cherokee Cty.) (83-0174)	1/18/1985	
Liberty-Eylau Independent School District (Bowie Cty.) (84-0121)	2/26/1985	
Dawson County (84-0343)	8/6/1985	
El Campo (Wharton Cty.) (84-1364)	11/8/1985	
Lynn County (85-0895)	11/18/1985	
Terrell County (85-0674)	1/13/1986	
Plainview Independent School District (Hale Cty.) (86-0674)	4/10/1986	
El Campo (Wharton Cty.) (86-1633)	7/18/1986	
Trinity Valley Community College District (Anderson, Henderson, Hunt, Kaufman and Van Zandt Ctys.) (86-0002)	10/14/1986	
Wharton Independent School District (Falls Cty.) (87-0487)	12/29/1986	
Marlin Independent School District (Falls Cty.) (87-0487)	6/22/1987	
Crockett County (87-0300)	10/2/1987	
Columbus Independent School District (Colorado and Austin Ctys.) (87-0025)	1/4/1988	
Hondo Independent School District (Frio and Medina Ctys.) (87-0952)	1/22/1988	
Marshalltown Independent School District (Harrison Cty.) (87-0060)	4/18/1988	
San Patricio County (87-1132)	6/14/1988	
Jasper (Jasper Cty.) (88-0951)	8/12/1988	withdrawn 12/24/91
Lynn County (85-0895)	9/26/1988	
El Campo (Wharton Cty.) (88-1471)	2/3/1989	
Dallas County (88-0363)	2/27/1989	
Baytown (Chambers and Harris Ctys.) (88-0634)	3/20/1989	
Refugio Independent School District (Refugio Cty.) (88-1251)	5/8/1989	
Cuero (DeWitt Cty.) (89-0326)	10/27/1989	
Denver City (Yoakum Cty.) (88-1530; 88-1533)	2/5/1990	
Nolan County Hospital District (89-0794)	2/12/1990	
San Patricio County (89-0874)	5/7/1990	
State (90-0015)	11/5/1990	
Freeport (Brazoria Cty.) (90-0164)	11/13/1990	
Grapeland (Houston Cty.) (90-0960)	12/21/1990	
Dallas (Collin, Dallas, Denton, Kaufman & Rockwall Ctys.) (89-0245)	3/13/1991	
Lubbock County Water Control and Improvement District No. 1 (Lubbock Cty.) (90-4938)	3/19/1991	
Refugio Independent School District (Refugio Cty.) (90-1268)	4/22/1991	
Dallas (Collin, Dallas, Denton, Kaufman & Rockwall Ctys.) (89-0425, 91-0642)	5/6/1991	
State (90-0003)	8/23/1991	withdrawn 8/4/92
Houston (Harris, Montgomery and Fort Bend Ctys.) (91-2353)	10/4/1991	
State (91-3395)	11/12/1991	
Del Valle Independent School District (Travis Cty.) (91-3124)	12/24/1991	
El Campo (Wharton Cty.) (91-0530)	1/7/1992	
State (92-0070)	3/9/1992	
State (92-0146)	3/10/1992	
Gregg County (91-3349)	3/17/1992	
Calhoun County (91-3549)	3/17/1992	
Galveston County (91-3601)	3/17/1992	
Castro County (91-3780)	3/30/1992	
Monahans-Wickett-Pyote Independent School District (Ward Cty.) (91-3272)	3/30/1992	
Ellis County (91-4250)	3/30/1992	
Lubbock Independent School District (Lubbock Cty.) (91-3910)	3/30/1992	
Terrell County (91-4052)	4/6/1992	
Bailey County (91-3730)	4/6/1992	
Cochran County (91-4049)	4/6/1992	
Hale County (91-4048)	4/10/1992	
Deaf Smith County (91-4051)	4/10/1992	
Gaines County (91-3990)	7/14/1992	
Wilmer (Dallas Cty.) (90-0393)	7/20/1992	
Del Valle Independent School District (Travis Cty.) (7-31-92)	7/31/1992	
Ganado (Jackson Cty.) (92-0319)	8/17/1992	withdrawn 1/22/93
Castro County (92-4027)	10/6/1992	
Galveston (Galveston Cty.) (92-0136)	12/14/1992	
Atlanta Independent School District (Cass Cty.) (92-3754)	2/19/1993	
Carthage Independent School District (Panola Cty.) (92-4890)	3/22/1993	withdrawn 1/3/94
Corsicana Independent School District (Navarro Cty.) (92-4186)	3/22/1993	
Lamesa (Dawson Cty.) (92-0907)	4/26/1993	
Bailey County (93-0880)	5/4/1993	
Castro County (93-0917)	5/10/1993	
McCulloch County (93-0075)	6/4/1993	
Bailey County (93-0194)	7/19/1993	
Wharton County (92-5239)	8/30/1993	
Edwards Underground Water District (93-2267)	11/19/1993	
Marion County (93-3983)	4/18/1994	
State District Court (93-2585)	5/9/1994	
Harris County Criminal Court at Law (Harris Cty.) (93-2664)	5/31/1994	
Fort Bend County Court at Law (Fort Bend Cty.) (93-2475)	5/31/1994	
Mexia Independent School District (Limestone Cty.) (93-4623)	6/13/1994	
Tarrant County (94-3012)	8/15/1994	
Edna Independent School District (Jackson Cty.) (94-0866)	8/22/1994	
Morton (Cochran Cty.) (94-1303)	9/12/1994	
San Antonio (Bexar Cty.) (94-2531)	10/21/1994	
Karnes City (Karnes Cty.) (94-2366)	10/31/1994	
Judson Independent School District (Bexar Cty.) (94-4175)	11/18/1994	
	79	

Justice Department Objections -- 1995 -- 2004

State (94-4077)	2/17/1995	
Edwards Underground Water Conservation District (Gonzales Cty.) (94-0333)	3/2/1995	
Andrews (Andrews Cty.) (94-2271)	6/26/1995	
State (95-2017)	1/16/1996	
Webster (Harris Cty.) (96-1006)	3/17/1997	withdrawn 4/7/98
State (98-1365)	9/29/1998	withdrawn 10/21/98
Galveston (Galveston Cty.) (98-2149)	12/14/1998	withdrawn 02/04/02
Lamesa (Dawson City) (99-0270)	7/16/1999	
Sealy Independent School District (Austin Cty.) (99-3823)	6/5/2000	
Haskell Consolidated Independent School District (Haskell, Knox, and Throckmorton Ctys.) (2000-4426)	9/24/2001	
State (2001-2430)	11/16/2001	
Waller County (2001-3951)	6/21/2002	
Freeport (Brazoria Cty) (2002-1725)	8/12/2002	
	13	